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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1319

WILLIAM P. HAGERTY,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

In Re: Petition for Certiorari to the Supreme Court of Louisiana.

PETITION FOR REHEARING FROM DENIAL OF WRIT OF CERTIORARI.

G. WRAY GILL, SR.,
GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
F. IRVIN DYMOND,
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Attorneys for Petitioner.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, William P. Hagerty, through undersigned counsel, petitions this Court for a rehearing as to the judgment and opinion rendered in the above cause on the 27th day of May, 1968, for the following reasons:

I.

Petitioner was convicted under the Louisiana "theft" statute, LSA-R.S. 14:67, by a five man jury

on the 27th of June, 1966, and the conviction was affirmed by the State Supreme Court in December of 1967. Thus, both the trial and the disposition of the appeal occurred well prior to the decision of the Supreme Court of the United States in *Duncan v. State of Louisiana* (No. 410, Oct. Term, 1967, reported in *The Criminal Law Reporter* of May 22, 1968, Sec. 3, 3059).

II.

In the instant case, the constitutional rights of petitioner were prejudiced by the fact that he was tried for a felony, by a five-man jury, as distinguished from the twelve-man jury provided for in other felonies under Louisiana law. This presents the same constitutional problem as to denial of due process and equal protection of the laws as was involved in the *Duncan* case, *supra*. Although this point was not raised before, either during the trial in the District Court or in the State Supreme Court, it is submitted in view of the fact that defense counsel relied upon the jurisprudence as it existed prior to *Duncan, supra*, the delay in raising a serious constitutional issue of this magnitude is excusable and the issue should now be considered by this Honorable Court on rehearing in this case.

III.

Petitioner further shows, as an additional reason for the granting of the rehearing herein, that there has

been another major change in the law quo ad proper jury selection. We refer to the decision of the Fifth Circuit Court of Appeals in *Labat, et al. v. Bennett, Warden,* 365 F. 2d 698; (Fifth Circuit, Aug. 15, 1966, Rehearing denied, Sept. 30, 1966); Cert. den. 87 S. Ct. 1303, 386 U. S. 991, 18 L. Ed 2d 334.

Although petitioner herein is a white man, it is submitted that he was deprived of due process by the manner of juror selection which was declared invalid in *Labat, supra.* Moreover, in the opinion by the Fifth Circuit in the *Labat* case, the Court specifically relies upon *Thiel vs. Southern Pacific Co.* (1946) 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1183. In that case the Supreme Court of Georgia, dealing with a civil jury trial had held that exclusion of wage earners from the jury venire defeated the obtaining of a true and realistic cross-section of wage earners and this destroyed the proper "cross-section of the community" approach. This system of selection was held invalid and unconstitutional even as to a white litigant in a civil case. This issue, too, as in the first ground urged above, is excusable because counsel for defendant relied upon the existing jurisprudence at the time of trial and at time of the hearing in the Supreme Court of Louisiana; hence, the delay in raising this issue should not prevent its consideration at this time by Your Honors. The selection of jurors at the time of both the trial and the indictment in the instant case was virtually the same as it was at the critical time of *Labat, supra;* hence, due process was denied petitioner here likewise.

Since the instant case was tried on June 27, 1966, counsel for defendant (petitioner herein) had no means of anticipating the sweeping effect of the Fifth Circuit holding in *Labat, supra,* which was not to be decided until August 15, 1966, nearly two months later. Therefore, when the *Labat* decision was rendered it was apparently too late to raise the issue as to improper grand or petit jury selection in this proceeding. Hence, unless a rehearing is granted herein from the denial of certiorari, petitioner will be deprived of serious constitutional rights because he was both indicted and tried by jurors selected in the same manner as were those in *Labat, supra.* Moreover, although petitioner is a white man, under the rationale of the *Thiel* case, *supra,* the lack of an "adequate cross section of the community," quo ad jury selection, deprives petitioner of both due process of law and the equal protection of the laws.

For the foregoing reasons, petitioner respectfully submits that a rehearing should be granted herein from the denial of certiorari and that, ultimately the judgment below should be set aside and a new trial ordered.

Respectfully submitted,

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.....

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New Orleans, La.,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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G. W. GILL, SR.,
Of Counsel for Petitioner.

CERTIFICATE OF SERVICE.

I, G. Wray Gill, Sr. do hereby certify that I am of counsel for petitioner in the foregoing application for rehearing and that I am a member in good standing of the Bar of the Supreme Court of the United States. I further certify that copies of the foregoing petition for rehearing have been served upon the Attorney-General of Louisiana and the District Attorney for the Parish of Orleans, State of Louisiana, at their respective offices, by mail, by posting same, postage prepaid, on the ... day of June, 1968.

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G. W. GILL, SR.